No. 443.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WM. J. BRYAN, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Brief of Defendant in Error.

The sole question presented to the Court in this case is, *Does the embezzlement of money order funds by a Postoffice clerk, appointed and acting under Civil Service rules, relieve the Postmaster, even though free from negligence himself, from responsibility and liability to the Government upon his bond, or virtute officii, for the money thus misappropriated?*

The theories upon which rest the responsibility and liability of public officers for embezzled or stolen funds

entrusted to their possession or supervision are well stated in

Mechem on Public Officers, Sections 297-301, 912.

"Section 297. Liability of Sureties for Loss of "Funds. — The liability of the principal, and conse- "quently of his sureties, for a loss of the public funds "by the principal without intentional wrong upon his "part, is a question of great interest and importance, but "one upon which the authorities are in conflict.

"The undertaking of the principal, and of his sureties "for him, that he will faithfully perform the duties of his "office includes, either expressly or impliedly, that he "will duly pay over the public funds which come into his "hands. The question therefore arises, what loss of the "public funds can excuse him and his sureties from this "undertaking.

"And as obviously no loss can excuse them which is "based upon the officer's own negligence or default, the "question becomes narrowed to this: What loss occur- "ring without his negligence or default will excuse "them?

"In respect of this question, four theories, at, least, "have prevailed. Thus—

"Section 298. Same subject—One view.—1. One view "is based upon the strict language of the bond. The offi- "cer having bound himself and his sureties, without "reservation or qualification, by the express terms of his "bond that he will duly deliver and pay over the public "funds which come into his hands, *this obligation 'can "'only be met or discharged by making such delivery or pay- "'ment,' and that, having bound himself by his solemn agree- "ment to do this act, he must be 'held liable for its non-perform-*

" *'ance, though it is rendered impossible by events over which he*
" *'had no control.' If the parties had desired exemption in a*
" *given contingency, it should have been 'so nominated in the*
" *'bond.'*

" Section 299. Same Subject—Second view.—2. A " second view, somewhat analogous to the last, is based " upon the requirements of the public policy. *'Public* " *'policy,' says McLean, J., 'requires that every depositary of* " *'the public money should be held to a strict accountability.'* " *Not only that he should exercise the highest degree of vigi-* " *lance, but that 'he should keep safely' the moneys which come* " *to his hands.* Any relaxation of this condition would " open door to frauds which might be practiced with " impunity. A depositary would have nothing more to do " than to lay his plans and arrange his proofs, so as to " establish his loss without laches on his part. Let such " a principle be applied to our Postmasters, Collectors of " the Customs, receivers of public moneys, and others " who receive more or less of the public funds, and what " losses might not be anticipated by the public? No such " principle has been recognized or admitted as a legal de- " fense. And it is believed the instances are few, if in- " deed any can be found, where any relief has been given " in such cases by the interposition of Congress.

"As every depositary receives the office with a full " knowledge of its responsibilities, he cannot, in case of " loss, complain of hardship. He must stand by his bond " and meet the hazards which he involuntarily incurs.

" Section 300. Same Subject—A Third View—3. A " third view is based upon the assumption that, by force of " the statutes governing the subject, the officer becomes, " in effect, the debtor of the public. *His liability, therefore,* " *becomes absolute, and, like other debtors, he is not relieved*

" *from liability because he is so unfortunate as to lose, though* " *by unavoidable accident, the money with which he expected to* " *make payment. In legal effect, he is not a mere bailee, but he* " *loses his own money, and cannot, therefore, call upon the* " *public to bear the loss.*

" These views all lead obviously to the enforcement of an exceedingly strict liability.

"Section 301. Same Subject.--A Fourth View—4. But " another view, less stringent, and, in the opinion of the " writer, more consonant with reason and justice, has also " met with favor, *although the cases which maintain it are* " *few.*

" By this view the officer is regarded as standing in the " position of a bailee for hire, and bound, *virtute officii*, to " 'exercise good faith and reasonable skill and diligence " 'in the discharge of his trust, or, in other words, to bring " 'to its discharge that prudence, caution and attention " 'which careful men usually exercise in the management " 'of their own affairs,' but 'not responsible for any loss " 'occurring without any fault on his part.'

"The statute may, of course, impose, or the officer may himself " *assume, a more onerous responsibility*, but in the contemp- " lation of this theory, a greater liability does not result " from the simple undertaking to faithfully discharge the " duties of the office.

* * * * * *

" Section 912. Extent of Liability Under Statutes and " Bonds, and Excuses for Defaults.—*But the nature and ex-* " *tent of the liability in this respect is usually prescribed by* " *express statutes, and bonds are required to secure the faithful* " *performance of the duty.* In determining the extent of the " liability, therefore, regard must be had to these instru- " ments which declare it.

"Under some of these statutes, the money becomes, "upon its payment to the officer, in legal effect his money, "and he becomes a debtor to the public for the amount of "it. In such a case it is obvious that his liability is abso- "lute, and, like any other debtor, he must repay, although "he may have been so unfortunate as to lose and be de- "prived of the money, without his fault."

"In most cases, however, it is made the duty of the of- "ficer, either by the terms of the statute prescribing his "duties, the performance of which the bond, in general "terms, is given to secure, or by the very language of the "bond itself, to safely keep the public funds which come "into his hands, and to pay them over according to law. "In a few instances it is further provided that they shall "be deposited in a certain manner or shall be kept in "certain safes or other receptacles provided by the pub- "lic; in which cases the officer who complies with the re- "quirements is relieved from liability.

"But except in such instances, *the officer's liability is, "according to the great majority of the decisions, held to be "fixed by the terms of the statute or the language of the bond, "and he is regarded not as a mere bailee, but as one who, by the "terms of his undertaking, has incurred a fixed and absolute "liability to keep the money safe at all hazards.*

"Thus a county or township Treasurer or other re- "ceiver of public moneys is not discharged from liability "by the failure of a bank in which he had deposited the "funds, though he was guilty of no negligence in ascer- "taining its financial condition, and although the county "provided no safe place for its deposit; or by being vio- "lently robbed of it; or by its being stolen from the "county safe, without any lack of care on his part; or by "the destruction of the money, without his fault.

"In a few cases, however, this absolute liability has "been denied, and the officer has been held to be excused "by the act of God or the public enemy, or by losses oc- "curring without fault upon his part."

The bond of plaintiff in error Bryan and his sureties provides, in part:

"That if the said William J. Bryan shall faithfully dis- "charge all the duties and trusts imposed upon him ei- "ther by law or the rules and regulations of the Post- "office Department, and faithfully, once in three months, "or oftener, if thereto required, render accounts of his re- "ceipts and expenditures, as Postmaster, to the Post- "office Department, in the manner and form prescribed "by the Postmaster General, and shall pay the balance "of all moneys that shall come into his hands, from "* * * money orders * * * in the manner pre- "scribed by the Postmaster General for the time being, "and shall keep safely, without loaning, using, deposit- "ing in other banks or exchanging for other funds than "as allowed by law, all the public money collected by "him, or otherwise at any time placed in his possession "and custody, till the same is ordered by the Postmaster "General to be transferred or paid out; and when such "orders for transfer or payment are received, shall faith- "fully and promptly make the same as directed; and "shall also faithfully do and perform all of the duties "and obligations imposed upon or required of him by law "or the rules and regulations of the Department, in con- "nection with the money-order business; * * * and "moreover, shall faithfully account with the United "States in the manner directed by the said Postmaster "General for all moneys, * * * money-orders * * *

" which he, as Postmaster, or as agent and depositary " as aforesaid, shall receive for the use and benefit of the " said Postoffice Department, then the above obligation " shall be void; otherwise, of force."

It may be here observed, in passing, that it is idle for plaintiffs in error to contend that their amended answer unequivocally denies one or more material allegations in the complaint, inasmuch as the context shows exactly the extent of such denial and the scope and significance which the pleader expected would be placed thereon. Had these denials been unqualified, issues of fact would have been presented by the pleadings which would have necessitated a trial.

What are these denials? Plaintiffs in error deny that Bryan did not execute and discharge well and faithfully the duties and trusts imposed on him as Postmaster, and did not account for and pay to the Government the balance of all moneys that came into his hands; but admit that his money-order clerk embezzled the funds, set forth in the complaint. The denials are so far qualified by the admission that issues of law, rather than of fact, are raised.

The answer was framed and worded, and plaintiffs in error were content to rest their case upon the theory that the receipt of money by an employee of the Postoffice was not a receipt by his superior officer, the Postmaster, and the embezzlement of such money by the former did not make the latter liable therefor upon his bond or otherwise; and the pleading will certainly be construed all together, and not in isolated portions.

The law reads that a Postmaster's bond, where his office is designated as a money-order office, "shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business."

U. S. R. S., Section 3834.

The Postal Laws and Regulations (ed. 1887), Sections 462-464, in force during Mr. Bryan's term of office, provide for allowances for clerk hire in the money-order service, and the Postmaster's responsibility for such clerks.

It is further provided, in

U. S. R. S., Section 4029, that:

"The Postmaster of every city where branch Post-
"offices or stations are established and in operation, sub-
"ject to his supervision, is authorized, under the direc-
"tion of the Postmaster General, to issue, or to cause to
"be issued, by any of his assistants or clerks in charge of
"branch Postoffices or stations, postal money-orders, pay-
"able at his own or at any other money-order office, or at
"any branch Postoffice or station of his own, or of any
"other money-order office, as the remitters thereof may
"direct; *and the Postmaster and his sureties shall, in every*
"*case, be held accountable upon his official bond for all moneys*
"*received by him or his designated assistants or clerks in*
"*charge of stations, from the issue of money orders, and for all*
"*moneys which may come into his or their hands, or be placed*
"*in his or their custody by reason of the transaction by them of*
"*money order business.*

The Act of March 3, 1883 (22 U. S. Stats. at L., 528), Section 4, enacts, in part:

"That the salaries of Postmasters, as fixed by law, "shall be deemed and taken to be full compensation for "the responsibility and risk incurred, and for the per- "sonal services rendered by them as custodians for the "money-order and other funds of the Postoffice Depart- "ment."

This law was in force when Mr. Bryan was Postmaster, and his salary covered just such a risk as he is now seeking to avoid.

The foregoing statutory law surely indicates that Congress contemplated Postmasters should be held liable for all money-order funds regularly coming either into their possession or that of their subordinates; and the bond in this case exacted for the faithful performance by Mr. Bryan of his duties as Postmaster at San Francisco, Cal., is clearly in accordance with law.

Plaintiffs in error contend, in effect, that the principal and sureties upon the bond in question cannot be held liable to the Government because:

(1) The Postmaster was guilty of no negligence;

(2) The embezzled funds did not actually and physically come into his hands; and

(3) He did not select the money-order clerk, as the latter held office under the Civil Service.

The generally accepted authorities do not consider such reasons sufficient to excuse a public officer for the culp-

able acts of his subordinates, especially in view of the bond which the law requires the officer shall give to the Government. The act of the money-order clerk was *civiliter* the Postmaster's act; nor does it matter how the former secured his position. When the Postmaster voluntarily undertook to assume the duties of his office he was presumed to know the law governing the appointment of his subordinates, and he thereby accepted and made the money-order clerk his agent in the performance of the public business relating to that particular department. He therefore cannot now be heard to say that Kennedy's position as such clerk was so far independent of his, as Postmaster, that the latter was not responsible for the former's embezzlement.

Public policy, the language of the bond, and the relations assumed between the Government and its officers dictate that only the acts of God or the public enemy shall excuse a public official entrusted with the care and handling of public funds from liability arising from loss incurred either by himself or his subordinates; and the Supreme Court of the United States, as well as the Circuit Court of this circuit, the latter in two instances at least, have held such officers to a rigid responsibility.

Before referring to these cases it may be well to here observe that Story on Bailments, Sections 463, 620, the same author on Agency, Sections 319, seq., and the opinion of the Assistant Attorney General for the Postoffice Department, relied upon by the learned counsel for plaintiffs in error to sustain their case, are based upon

some English and scattering American decisions, and upon the case of

Dunlop vs. Munroe, 7 Cranch., 242,

all of which, as far as we are aware, purport to define the liability of a public officer at common law to *a third person* for the nonfeasance or misfeasance of an inferior officer of the same department, but not the liability of an officer for similar acts *to the Government upon his bond or under the statute.* Herein lies the distinction which these authors have failed to observe. Otherwise their opinions are irreconcilable with later authoritative decisions.

In the case of

U. S. vs. Prescott et al., 3 How., 578,

the opinions of the Judges of the Court below were opposed on this question, namely:

" Does the felonious stealing, taking and carrying away " the public moneys in the custody of a receiver of public " moneys, without any fault or negligence on his part, " discharge him and his sureties, and is that a good and " valid defense to an action on his official bond?"

The bond sued upon was practically the same as that here involved.

Said the Court, speaking through Mr. Justice McLean (pp. 587-589):

" This is not a case of bailment, and, consequently, the " law of bailment does not apply to it. The liability of " the defendant, Prescott, arises out of his official bond, " and principles which are founded upon public policy. " The conditions of the bond are, that the said Prescott

" has 'truly and faithfully executed and discharged, and
" ' shall truly and faithfully continue to execute and dis-
" ' charge, all the duties of said office' (of receiver of pub-
"lic moneys at Chicago), 'according to the laws of the
" ' United States; and moreover has well, truly and faith-
" ' fully, and shall well, truly and faithfully, keep safely
" ' without loaning or using, all the public moneys col-
" 'lected by him, or otherwise at any time placed in his
" ' possession and custody, till the same had been or
" ' should be ordered, by the proper department or officer
" ' of the Government, to be transferred or paid out; and
" ' when such orders for transfer or payment had been or
" ' should be received, had faithfully and promptly made,
" ' and would faithfully and promptly make, the same, as
" ' directed,' etc.

" The condition of the bond has been broken, as the de-
"fendant, Prescott, failed to pay over the money received
" by him, when required to do so; and the question is,
" whether he shall be exonerated from the condition of
" his bond, on the ground that the money had been stolen
" from him.

"The objection of this defense is, that it is not within
" the condition of the bond; and this would seem to be
" conclusive. *The contract was entered into on his part, and*
" *there is no allegation of failure on the part of the Govern-*
" *ment; how, then, can Prescott be discharged from his bond?*
" *He knew the extent of his obligation, when he entered into it,*
" *and he has realized the fruits of this obligation by the enjoy-*
" *ment of the office. Shall he be discharged from liability con-*
" *trary to his own express undertaking? There is no principle*
" *on which such a defense can be sustained. The obligation to*
" *keep safely the public money is absolute, without any condi-*
" *tion, express or implied; and nothing but the payment of it,*
" *when required, can discharge the bond.* * * * *

"Public policy requires that every depositary of the "public money should be held to a strict accountability. "Not only that he should exercise the highest degree of "vigilance, but that 'he should keep safely' the moneys "which come to his hands. Any relaxation of this con- "dition would open a door to frauds, which might be "practiced with impunity. A depositary would have "nothing more to do than to lay his plans and arrange "his proofs, so as to establish his loss, without laches on "his part. Let such a principle be applied to our Post- "masters, Collectors of the Customs, receivers of public "moneys, and others who receive more or less of the pub- "lic funds, and what losses might not be anticipated by "the public! No such principle has been recognized or "admitted as a legal defense. And it is believed the in- "stances are few, if, indeed, any can be found, where any "relief has been given in such cases by the interposition "of Congress.

"*As every depositary receives the office with a full knowledge "of its responsibilities, he cannot, in case of loss, complain of "hardship. He must stand by his bond, and meet the hazards "which he voluntarily incurs.*

"The question certified to us is answered. that the de- "fendant, Prescott, and his sureties, are not discharged "from the bond, by a felonious stealing of the money, "without any fault or negligence on the part of the de- "positary; and, consequently, that no such defense to the "bond can be made."

See further, on the general subject of liability upon official bonds:

Notes in Lawyer's edition to U. S. vs. Giles, 9 Cranch., 212; and to

Postmaster General vs. Early, 12 Wheat., 136.

In the case of

U. S. vs. Morgan et al., 11 How., 154,

the Government sought to enforce a pecuniary liability upon the bond of a Collector of Customs for the District of Mississippi, arising from the theft of certain canceled Treasury notes, before leaving the Collector's agent for transmission to Washington through the Postoffice Department, and the subsequent re-use of some of these notes in paying duties upon imported merchandise at the same place.

The Court, speaking through Mr. Justice Woodbury, adhered to the principles enunciated in the case just quoted, and said:

"The argument which has been pressed to exonerate "him, even from this extent of liability, rests on an erro- "neous impression that he was acting as a bailee, and "under the responsibilities of only the ordinary diligence "of a depositary as to the canceled notes, when in truth "he was acting under his commission and duties by law, "as Collector, and under the conditions of his bond. The "Collector is no more to be treated as a bailee in this case "than he would be if the notes were still considered for "all purposes as money.

"He did not receive them as a bailee, but as a collect- "ing officer. He is liable for them on his bond, and not "on any original bailment or lending.

"And if the case can be likened to any species of bail- "ment in forwarding them, by which they were lost, it is "that of a common carrier to transmit them to the Treas- "ury, and in doing which he is not exonerated by ordi-

" nary diligence, but must answer for losses by larceny " and even robbery. (2 Salk., 919; 8 Johns., 213; Angel " on Carriers, Sections 1, 9.)

Again, the Supreme Court, in the case of

U. S. vs. Keehler et al., 9 Wall., 83,

in holding that the acts of the Confederate Congress and order of its Postoffice Department did not excuse a Postmaster in a Southern State, during the War of the Rebellion, for parting with the possession of funds of the Federal Government then in his hands, reiterated the foregoing views, saying, through Mr. Justice Miller:

" But this Court has decided more than once that in an " action on the official bonds of such officers the right of " the Government does not rest on the implied contract " of bailment, but on the express contract found in the " bond, to pay over the funds. And on this principle it " was held in *U. S.* vs. *Prescott*, 3 How., 578, that a plea " which averred positively that the money was stolen " from the officer, without any fault or negligence on his " part, was no defense. It would be difficult to find a " stronger case for relief from a contract to keep safely " and pay over the public money than this. *But the Court " held that the contract was one which the defendant had volun- " tarily undertaken, and which he must at his own peril per- " form.* This ruling was repeated in *U. S.* vs. *Dashiel*, 4 " Wall., 185; also in *U. S.* vs. *Morgan*, 11 How., 162. Such " was the law as declared by this Court long before the " rebellion broke out, and however hard it may be in some " of its aspects, the Court has no option but to act on it.

" But Congress seems not to have been inattentive to

" the injustice which the rule might work in some cases,
" and has, by the Act of April 29, 1864 (13 Stat. at L., 62),
" provided for the relief of Postmasters situated like de-
" fendant, who have manfully done their duty. That Act
" provided that in all cases where loyal Postmasters have
" been robbed by Confederate forces or rebel guerrillas,
" without fault or neglect of such Postmaster, the Post-
" master General may credit them in settlement with the
" amount lost by the robbery; and if the officer had
" settled and paid the amount before the law was passed,
" it should be paid back to him. And by the Act of March
" 3, 1865, the relief is extended to losses by any armed
" force whatever, either by robbery or burning. These
" statutes recognize the rule laid down by this Court,
" and provide for such exceptions as can be brought
" within their terms. For other cases, which present pe-
" culiar claims for relief, as this may do if it shall be
" shown that the claim of Clemmens would be a just sub-
" sisting demand against the Government but for this
" payment, the parties must resort to Congress. The
" Court is not authorized to make other exceptions than
" those made by the statutes."

Where a receiver of public moneys had given a bond similar to that here in question for the faithful performance of his duties as required by law, proof that he had been robbed of the public money received by him was held no defense to a suit on such bond, in the case of

Boyden et al., vs. U. S., 13 Wall., 17.

The Court there said that his liability was to be measured by his bond; and where that binds him to pay the money a cause which renders that impossible constitutes

no defense. Said Mr. Justice Strong, in delivering the Court's opinion:

"Were a receiver of public moneys, who has given "bond for the faithful performance of his duties as re- "quired by law, a mere ordinary bailee, it might be that "he would be relieved by proof that the money had been "destroyed by fire, or stolen from him, or taken by irre- "sistible force. He would then be bound only to the ex- "ercise of ordinary care, even though a bailee for hire. "The contract of bailment implies no more, except in the "case of common carriers, and the duty of a receiver, "*virtute officii*, is to bring to the discharge of his trust "that prudence, caution and attention which careful men "usually bring to the conduct of their own affairs. He "is to pay over the money in his hands as required by "law, but he is not an insurer. *He may, however, make him- "self an insurer by express contract, and this he does when he "binds himself in a penal bond to perform the duties of his "office without exception. There is an established difference "between a duty created merely by law and one to which is "added the obligation of an express undertaking.* The law "does not compel to impossibilities; but it is a settled "rule that if performance of an express engagement be- "comes impossible by reason of anything occurring after "the contract was made, though unforeseen by the con- "tracting party, and not within his control, he will not "be excused. (Met. Cont., 213; *The Harriman*, 9 Wall., "161.) *The rule has been applied rigidly to bonds of public "officers intrusted with the care of public money. Such bonds "have almost invariably been construed as binding the obli- "gators to pay the money in their hands when required by law, "even though the money may have been lost without fault on "their part.*"

The Court then distinguishes cases supposing to hold to the contrary, and shows that where third persons are involved a different rule of liability exists than where the relation exists between the Government only and its officers.

The Court approves of the doctrine laid down in the foregoing cases from which quotations have been made, finally saying:

"Applying it to the case now in hand, it makes it clear " that the evidence offered by the defendants, tending to " prove that the receiver had been robbed of the public " money received by him, was rightly rejected as consti- " tuting no defense to the suit on the receiver's bond. It " is true that in *Prescott's* case the defense set up was that " the money had been stolen, while the defense set up " here is robbery. But that can make no difference, unless " it be held that the receiver is a mere bailee. If, as we " have seen, his liability is to be measured by his bond, " and that binds him to pay the money, *then the cause* " *which renders it impossible for him to pay is of no import-* " *ance, for he has assumed the risk of it.*"

The Supreme Court, in the case of

U. S. vs. Thomas et al., 15 Wall., 337,

somewhat limited the doctrine formerly established by it in such class of cases as to excuse a public officer and his sureties from liability upon an official bond for loss arising from the act of God, or the public enemy, without any neglect or fault of such officer. So, where the rebel authorities, during the War of the Re-

bellion, forcibly seized public moneys in the officer's hands, the Court held that there was no liability upon the bond, which was in the usual form. The Court said, speaking through Mr. Justice Bradley:

"The Acts of Congress with respect to the duties of "collectors, receivers and depositaries of public moneys, "it must be conceded, manifest great anxiety for the due "and faithful discharge by these officers of their respons- "ible duties, and for the safety and payment of the "moneys which may come to their hands. They are ex- "pressly required to keep safely, without loaning, using, "depositing in banks, or exchanging for other funds than "as specially allowed by law, all the public money col- "lected by them, or in their possession or custody, till or- "dered by the proper department or officer to be trans- "ferred or paid out; and where such orders for transfer "or payment are received, faithfully and promptly to "make the same as directed. (9 Stat. at L., 69, Section 9.)

"To obviate all excuse for casual losses, it is provided "that they shall be allowed, under the direction of the "Secretary of the Treasury, all necessary additional ex- "penses for clerks, fireproof chests or vaults, or other "necessary expenses of safe keeping, transferring and "disbursing said moneys (9 Stat. at L., Section 13). And "it is expressly made embezzlement and a felony, for an "officer charged with the safe keeping, transfer and dis- "bursement of the public moneys, to convert them to his "own use, or to use them in any way whatever, or to loan "them, deposit them in bank, or to exchange them for "other funds except as ordered by the proper department "or officer. (9 Stat. at L., Section 16.) Every receiver of "public money is required to render his accounts quarter-

" yearly to the proper accounting officers of the Treasury,
" with the vouchers necessary to the prompt settlement
" thereof, within three months after the expiration of
" each quarter, subject, however, to the control of the
" proper department. (3 Stat. at L., 723, Section 2.) Be-
" sides this, all such officers are required to give bonds
" with sufficient sureties for the due discharge of all these
" duties. (1 Stat. at L., 705; 2 Stat. at L., 75; 9 Stat. at
" L., 60, 61, etc.) And upon making default and being
" sued, prompt judgment is directed to be given, and no
" claim for a credit is to be allowed unless it has first been
" presented to the accounting officers of the Treasury for
" examination and disallowed, or unless it be shown that
" the vouchers could not be procured for that purpose, by
" reason of absence from the country, or some unavoid-
" able accident. (1 Stat. at L., 514, Sections 3, 4.)

" These provisions show that it is the manifest policy of
" the law to hold all collectors, receivers and depositaries
" of the public money to a very strict accountability. The
" legislative anxiety on the subject culminates in requir-
" ing them to enter into bond with sufficient sureties for
" the performance of their duties, and in imposing crim-
" inal sanctions for the unauthorized use of the moneys.
" Whatever duty can be inferred from this course of legis-
" lation is justly exacted from the officers. No ordinary
" excuse can be allowed for the non-production of the
" money committed to their hands. Still they are noth-
" ing but bailees. To call them anything else, when they
" are expressly forbidden to touch or use the public
" money except as directed, would be an abuse of terms.
" But they are special bailees, subject to special obliga-
" tions. It is evident that the ordinary law of bailment
" cannot be invoked to determine the degree of their re-

" sponsibility. This is placed on a new basis. To the ex-
" tent of the amount of their official bonds, it is fixed by
" special contract; and the policy of the law as to their
" general responsibility for amounts not covered by such
" bonds may be fairly presumed to be the same. In the
" leading case of the *United States* vs. *Prescott*, 3 How., 587
" (which was an action on a similar bond to that now un-
"der consideration), the Court say: 'This is not a case of
" ' bailment, and consequently the law of bailment does
" ' not apply to it. The liability of the defendant, Pres-
" ' cott, arises out of his official bond, and the principles
' ' which are founded on public policy.' After reciting the
" condition of the bond, the Court adds, with a greater
" degree of generality, we think, than the case before it
" required: 'The obligation to keep safely the public
" ' money is absolute, without any condition, express or
" ' implied; and nothing but the payment of it, when re-
" ' quired, can discharge the bond.'

" This broad language would seem to indicate an opin-
" ion that the bond made the receiver and his sureties
" liable at all events, as now contended for by the Govern-
" ment. But that case was one in which the defense set
" up that the money was stolen, and a much more
' limited responsibility than that indicated by the above
" language would have sufficed to render that defense
" nugatory. And as the money in the hands of a receiver
' is not his; as he is only the custodian of it; it would
" seem to be going very far to say that his engagement to
" have it forthcoming was so absolute as to be qualified
" by no condition whatever, not even a condition implied
" in law. Suppose an earthquake should swallow up the
" building and safe containing the money, is there no con-
" dition implied in the law by which to exonerate the re-
" ceiver from responsibility?

"We do not question the doctrine so strongly urged by "the counsel for the Government, that performance of an "express contract is not excused by reason of anything "occurring after the contract was made, though unfore- "seen by the contracting party, and though beyond his "control—with the qualification, however, that the thing "to be done does not become physically impossible; as, "to cultivate an island which has sunk into the "sea. * * *

"It is contended that the bond, in this case, has the ef- "fect of such a special contract, and several cases of ac- "tions on official bonds have been cited to support the "proposition. * * * It must be conceded that the "language used by the Court, not only in the case already "referred to, but in some of the other cases cited, seems "to favor the rule contended for. But in none of them "was the defense of overruling necessity interposed. "They were all cases of alleged theft or robbery, or some "other cause of loss, which would have been insufficient "to exonerate a common carrier from liability. *They all "concur in establishing one point, however, of much import- "ance, that a bond with an unqualified condition to account for "and pay over public moneys enlarges the implied obligation of "the receiving officer, and deprives him of defenses which are "available to an ordinary bailee;* but they do not go the "length of deciding that he thereby becomes liable at all "events; although expressions looking in that direction, "but not called for by the judgment, may have been "used. * * * *

"It is unnecessary to examine the cases further in de- "tail. It appears from them all (except, perhaps, the "New York case) *that the official bond is regarded as laying "the foundation of a more stringent responsibility upon col-*

" *lectors and receivers of public moneys. It is referred to as a* " *special contract, by which they assume additional obligations* " *with regard to the safe keeping and payment of those moneys,* " *and as an indication of the policy of the law with regard to* " *the nature of their responsibility.* But, as before remarked, " the decisions themselves do not go the length of making " them liable in cases of overruling necessity."

The Court's attention is finally called to the recent case of

U. S. vs. Zabriskie et al., 87 Fed, Rep., 714,

where the decision was rendered by Judge Hawley, sitting in the United States Circuit Court for the District of Nevada. It was there held that, under the statute, the melter and refiner in the Mint at Carson City, Nev., was liable upon his official bond for the embezzlement of his assistant, though not committed through any fault of the former. Said the learned Judge:

" How can the melter and refiner be discharged from " his bond? He and his sureties knew the extent of his " obligation when he entered upon the duties of his office. " *The obligation to faithfully and safely keep the bullion, gold* " *and silver metals, the property of the Government, committed* " *to his charge by the Superintendent of the Mint, is absolute,* " *without any condition whatever; and he cannot relieve him-* " *self from this duty until the same 'is returned to the Superin-* " *'tendent, and the proper voucher obtained,' unless, as is held in* " *some cases, the loss thereof was occasioned by the act of God* " *or a public enemy with whom the Government is itself at* " *open war—an exception which has no application to this case.* " In this connection, it is deemed proper to state that a " certificate or voucher given to an officer before the dis-

" covery of any theft or embezzlement, 'that his accounts " 'have been examined, found correct, and closed,' would " not operate to release him or his sureties from liability " on his bond (Moses *vs.* U. S., 166 U. S., 571, 17 Sup. Ct., 682).

" It is conceded by defendants that, if the bullion and " metals in the custody of the melter and refiner had been " stolen by a stranger or highway robber, the melter and " refiner would be liable for the loss. Such is undoubt- " edly the law. It was so held in State vs. Nevin, 19 Nev., " 162, 7 Pac., 650. Numerous authorities bearing upon " this point are there cited and elaborately reviewed. See, " also, 4 Am. and Eng. Enc. Law (2d ed.), tit. 'Bonds,' p. " 681, and authorities there cited. But counsel argue that " there is a distinction between such cases and the pres- " ent one, in this: That here the complaint affirmatively " shows that the theft or embezzlement was committed " by an independent officer of the Government, to wit, by " the assistant melter and refiner of the Mint, without " any neglect, carelessness or wrongdoing upon the part " of the melter and refiner. To sustain this position, three " cases are cited and claimed to be conclusive in favor of " the defendants, viz.: Keenan vs. Southworth, 110 Mass., " 474; Dunlop vs. Munroe, 7 Cranch, 242; Robertson vs. " Sichel, 127 U. S., 507, 8 Sup. Ct., 1286. An examination " of these cases will clearly show that they have no appli- " cation whatever to the facts of this case; that each re- " lates to cases of personal negligence upon the part of a " subordinate officer — an entirely separate and distinct " principle from the rule of law applicable to the official " duties of public officers, and the liabilities of themselves " and of their sureties upon their official bonds. * * *

" In all cases of personal negligence of this general

" character, upon the part of an assistant or subordinate " officer, it is undoubtedly true that the principal cannot " be held liable in damages without proof that he was " personally guilty of negligence or carelessness. But " that is not this case. Here the action is upon a bond, " the condition of which, according to the averments of " the complaint, has been broken. *As a general rule, pub-* " *lic officers with reference to the public funds or property with* " *which by law they are entrusted, become virtually the insurers* " *of such funds and property, and are held accountable for any* " *and all such funds and property, even if stolen from them* " *without any fault, negligence or carelessness upon their part.* " The rule upon this subject is clearly and correctly stated " in Board *vs.* Jewell, 44 Minn., 427, 428, 46 N. W., 914, as " follows: * * * "

The Court further quotes with approval the decision of the trial Court in the case at bar (82 Fed. Rep., 290), and the decision of the Circuit Court of Appeals in the case of

Bosbyshell et al. vs. U. S., 77 Fed. Rep., 944,

and concludes as follows:

" The questions presented by counsel have received the " care and attention which the importance of this case " demands. They have been discussed at much greater " length than was really necessary. If the principles " herein announced—which hold the innocent responsible " for the acts of the guilty—may to the layman at first " blush seem harsh, a moment's thought will dispel the " delusion. The ease with which frauds are now commit- " ted against the Government demands not only that the " perpetrators be promptly punished, but that the safe-

"guards which now protect the Government, by requir-
"ing good and sufficient bonds for the faithful perform-
"ance of the statutory duties of all public officers, should
"not be relaxed. It is substantially the only means to
"secure redress and insure the highest degree of care and
"diligence in the selection of subordinates. Any other
"rule would open the door to frauds and crimes innumer-
"able, leaving the Government without any protection.
"But, in any event it is perhaps enough to say that the
"liability of a public officer is to be measured and decided
"by the terms of the bond itself, construed, as it must be,
"in the light of the duties imposed upon him by law; and
"that the conclusions reached are supported by sound
"reason, based upon well-settled principles of public pol-
"icy, and sustained by all of the well-considered cases—
"both National and State—upon the subject."

From the foregoing views it is therefore respectfully submitted that the Circuit Court did not err in sustaining the demurrer to the amended answer herein, and its decision should be here sustained.

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